INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	5
Reasons for granting the writ	6
Conclusion	17
Appendix	19

CITATIONS

Cases:

Avina v. *Brownell*, 112 F. Supp. 15	8
Bruner v. *United States*, 343 U. S. 112	12, 14
Collett, Ex parte, 337 U. S. 55	12, 14
Correia v. *Dulles*, 129 F. Supp. 533	8
D'Argento v. *Dulles*, 113 F. Supp. 933	8
Fujii v. *Dulles*, 224 F. 2d 906	11
Fusae Yamamoto v. *Dulles*, 16 F. R. D. 195	8
Gagliano v. *Nabers*, 222 F. 2d 958, certiorari denied, 350 U. S. 902	14
Hallowell v. *Commons*, 239 U. S. 506	12
Kaplan v. *Tod*, 267 U. S. 228	17
Ly Shew v. *Acheson*, 110 F. Supp. 50, reversed, *Ly Shew* v. *Dulles*, 219 F. 2d 413	10
Marcello v. *Bonds*, 349 U. S. 302	14
Matsuo v. *Dulles*, 133 F. Supp. 711	8
Nevarez v. *Brownell*, 218 F. 2d 575	7, 9
Ng Gwong Dung v. *Brownell*, 112 F. Supp. 673	8
Shaughnessy v. *Mezei*, 345 U. S. 206	17
Shomberg v. *United States*, 348 U. S. 540	12, 14
Suda v. *Dulles*, 224 F. 2d 908	11
United States v. *Menasche*, 348 U. S. 528	12

370892—56——1

Statutes: Page

Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1101, *et seq*:

Section 212 (d)---- 17

Section 241 (d)---- 13, 14

Section 313 (a)---- 14

Section 358---- 10

Section 360 (a)---- 3, 6, 7, 8, 11, 12, 13, 14, 16

Section 403 (a)---- 3

Section 405 (a)---- 4, 6, 11, 14

Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. (1946 ed.) 501, *et seq*:

Section 501, 54 Stat. 1137, 8 U. S. C. (1946 ed.) 501, *et seq*---- 9

Section 503---- 2, 5

Miscellaneous:

H. Rep. 1365, 82nd Cong., 2d Sess., p. 87---- 16

Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess. on S. 716, H. R. 2379, and H. R. 2816-- 15

S. Rep. 1515, 81st Cong., 2d Sess---- 15

S. Rep. 1137, 82nd Cong., 2d Sess., p. 50---- 16

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

WONG KAY SUEY, WONG POO SING, AND EMILY WONG

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, reversing the judgments of the United States District Court for the District of Columbia which had denied preliminary injunctions sought in connection with actions under Section 503 of the Nationality Act of 1940 on the ground that the court was without jurisdiction of the actions.

OPINIONS BELOW

The consolidated opinion of the Court of Appeals (Appendix, *infra*, pp. 19–24) is not yet reported. The findings of fact and conclusions of

law of the District Court in each case appear in the record (R. 15–19).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1955 (Appendix, *infra*, pp. 25–26). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Respondents, who sought admission to the United States as citizens, were initially excluded in August 1952, and were released on bond pending exhaustion of their administrative remedies. In February 1954, each filed a complaint under Section 503 of the Nationality Act of 1940, seeking a declaration of citizenship. The question presented is whether that statute is applicable to these respondents, or whether, under Section 360 (a) of the Immigration and Nationality Act of 1952, respondents may obtain judicial review of the issue of citizenship only in habeas corpus proceedings.

STATUTES INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, provided:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official

[1] There is a consolidated record for all three cases.

> thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is in the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *[2]

Section 360 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273, 8 U. S. C. 1503, provides:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding un-

[2] Repealed, effective December 24, 1952, by Section 403 (a) (42) of the Immigration and Nationality Act of 1952.

> der the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. at 280, 8 U. S. C. 1101, note, provides:

> Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [sic], conditions, rights, acts, things, liabilities, obiligations, or matters the statutes or parts of statutes repealed by this Act are, unless

otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

STATEMENT

In February 1954, each of the respondents commenced an action in the District Court for the District of Columbia under Section 503 of the Nationality Act of 1940, *supra,* pp. 2–3, seeking a declaration that each was a citizen of the United States. The complaints alleged that the particular respondent was a citizen of the United States, born in China of an American citizen father, that each had arrived at San Francisco in 1952 (August and October), and that each had been denied admission by the San Francisco office of the Immigration and Naturalization Service. Each complaint further alleged that thereafter the respondent "was released under bond, and then

proceeded to exhaust all administrative rights and remedies available to him" (R. 7–11).

The respondents sought a preliminary injunction restraining petitioner from deporting them under the orders of exclusion (R. 14–15). After a hearing on the motion for preliminary injunction, the District Court entered findings of fact and conclusions of law—pointing out that the issue of citizenship arose in an exclusion proceeding—and denied the motion for injunction for lack of jurisdiction. The court held that Section 503 of the Nationality Act of 1940 had been repealed by the Immigration and Nationality Act of 1952; *supra*, pp. 3–4; that under Section 360 (a) of the 1952 Act no action for a declaration of citizenship can be maintained where the issue of citizenship is involved in an exclusion proceeding; and that Section 405 (a) of the 1952 Act, *supra*, p. 2, "does not save the remedy which might have been available to plaintiff under Section 503 of the Nationality Act of 1940" (R. 15–19).

The Court of Appeals reversed, holding that the savings clause of the 1952 Act is broad enough to cover respondent's "rights, under the 1940 Act, to sue for declaratory judgments" (Appendix, *infra*, pp. 19–24).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has held that a person initially denied admission by the immigration authorities before the effective date of the Immigration

and Nationality Act of 1952 has preserved to him the remedy of a declaratory judgment under Section 503 of the Nationality Act of 1940, despite the repeal of that statute by the 1952 Act, and despite the fact that Section 360 (a) of the 1952 Act provides that where issues of citizenship are involved in exclusion proceedings a declaratory judgment action shall not lie. In so holding, the court below has decided a matter of considerable importance in the administration of the nationality laws, in a manner which is contrary to the legislative purpose, and in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Nevarez* v. *Brownell,* 218 F. 2d 575.

1. In the *Nevarez* case, the Fifth Circuit had before it a person, born in the United States, who had left the country, and on his return in 1948 had been excluded on the ground that he had expatriated himself by leaving to avoid military service. An action for declaratory judgment, brought before 1952, had abated in 1952 for failure to substitute the new Attorney General. Thereafter, in 1953, the claimant brought a new action for a declaratory judgment under Section 503 of the Nationality Act of 1940, asserting that the timely filing of the first action gave him a right under the savings clause of the 1952 Act to continue the litigation. The Court of

370892—56——2

Appeals sustained a dismissal of the suit, declaring that under the express provisions of Section 360 of the 1952 Act (8 U. S. C. 1503, *supra*, pp. 3–4) the claimant could not bring an action for a declaratory judgment since "the question of appellant's nationality or citizenship was raised when he first sought admission to this country in 1948"; that his remedy, if any, was through habeas corpus. 218 F. 2d at pp. 577–578.[3] Although there had clearly been a right to bring a declaratory judgment action before the 1952 Act became effective, the Fifth Circuit held that such right did not survive.

In these cases, the court below has held that the right did survive even though the right to bring an action under former Section 503, before enactment of the 1952 Act, was not clear from the face of the complaints. It appears from the complaints that petitioners had merely been initially excluded in August and October 1952. Before there could be a final denial of their right to admission, their cases had to be heard by a Board of Special Inquiry, subject to review by the Board of Immigration Appeals. The complaints allege merely that after release on bond they

[3] There are a number of district court decisions in accord with *Nevarez*. *Matsuo* v. *Dulles*, 133 F. Supp. 711 (S. D. Cal.); *Correia* v. *Dulles*, 129 F. Supp. 533 (D. R. I.); *Fusae Yamamoto* v. *Dulles*, 16 F. R. D. 195 (D. Hawaii); *D'Argento* v. *Dulles*, 113 F. Supp. 933 (D. D. C.); *Ng Gwong Dung* v. *Brownell*, 112 F. Supp. 673 (S. D. N. Y.); *Avina* v. *Brownell*, 112 F. Supp. 15 (S. D. Tex.).

proceeded to exhaust their administrative remedies, without giving the dates on which the remedies were exhausted. Respondents did not and could not state that those administrative remedies had been exhausted before December 24, 1952, when the 1952 Act became effective.[4] Thus, although from the complaints it did not appear that the actual exclusion of petitioners had been concluded before the 1952 Act became effective, the court below held, contrary to *Nevarez,* that a "right" to bring an action under former Section 503 survived.

2. The issue to which this conflict of circuits relates is an important one which should be settled by this Court. The State Department has informed us that during the five years from 1948 to 1952, 37,518 certificates of loss of nationality were approved.[5] Under the doctrine enunciated by the court below in this case, the door is now open to all those citizenship claimants (not resident in this country) who have not previously done so to institute suits for declaratory judgment under former Section 503. In addition, the federal courts, particularly of California, had,

[4] The decisions of the Board of Immigration Appeals were dated May 20 and May 26, 1953, with rehearing denied on October 27, 1953.

[5] Section 501 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 901, provided as follows:

"Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign

under former Section 503, received a very large number of actions by persons claiming United States nationality as the foreign born children of American parents, and seeking to come to the United States. See *Ly Shew* v. *Acheson,* 110 F. Supp. 50 (N. D. Cal.), reversed, *Ly Shew* v. *Dulles,* 219 F. 2d 413 (C. A. 9). Under the decision below, all such persons whose requests for travel documents as American citizens were denied before 1952, on the ground that citizenship was not established, would still be able to bring actions under former Section 503. While the exact number of such cases is not known, it is thought to be considerable. Thus, the issue as to the proper procedure for determining the nationality of persons outside the United States who seek admission to the United States as citizens is one of continuing importance, not only to the administrative authorities, but to the courts.

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state has lost his American nationality under any provision of chapter IV of this Act ["Loss of Nationality"], he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Department of Justice, for its information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates."

Section 358 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1501) contains a comparable provision.

3. We submit, further, that the decision below is incorrect; that the language of both the savings clause in Section 405 (a) and of Section 360 (a) of the 1952 Act shows that Section 360 (a) was to govern any suit to obtain a declaration of citizenship begun after the effective date of the 1952 Act; and that pertinent principles of statutory construction and the legislative history of the 1952 Act also support this view.

(a). Section 405 (a) provides in relevant part that:

> Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; * * *.

Even assuming that respondents had been completely excluded by December 24, 1952, when the 1952 Act took effect, there is nothing in the wording of the savings clause which brings a declaratory judgment action not yet instituted [6]

[6] Of course, declaratory judgment actions actually begun before December 24, 1952, do fall under the savings clause. For this reason, the decisions of the Ninth Circuit in *Fujii* v. *Dulles*, 224 F. 2d 906, and *Suda* v. *Dulles*, 224 F. 2d 908, are not in point on the issue here involved. There, the actions had been commenced before the effective date of the 1952 Act, the issue being whether there had been a sufficient denial of a right of citizenship to warrant the institution of such action

within the purview of that section. The court below considered the "right" to bring a declaratory judgment action as a "right in process of acquisition" within the terms of the statute, but this seems clearly unsound. There is no "right" in any particular form of procedure. *Bruner* v. *United States,* 343 U. S. 112, 117; *Ex parte Collett,* 337 U. S. 55, 71; *Hallowell* v. *Commons,* 239 U. S. 506, 508. The "rights" which petitioners were asserting at all times, in the exclusion proceeding and in the declaratory judgment actions, were rights as American citizens which, if they existed at all, petitioners had from birth. A "right in the process of acquisition" within the terms of the savings clause, by its very wording, relates to a substantive right to be secured, such as the right to be naturalized which was involved in *United States* v. *Menasche,* 348 U. S. 528. No such "right" is involved in the question of whether there survives a particular mode of establishing substantive rights allegedly in existence for many years.

(b). Moreover, the savings clause itself provides that it shall apply "unless otherwise specifically provided." See *Shomberg* v. *United States,* 348 U. S. 540. Section 360 (a) is a section

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before December 24, 1952. Since it appeared from the Government's records that there had in fact been such a denial, no review of the decisions was sought, although the Government does not acquiesce in all of the statements contained in the Ninth Circuit opinion.

otherwise specifically providing for retroactive effect; it states that a declaratory judgment action shall not lie if the issue of citizenship "(1) *arose* [in an] exclusion proceeding under the provisions *of this or any other act,* or (2) is in issue *in any such* exclusion proceeding." [Emphasis added.] The use of the past tense "arose" in a statute which otherwise uses the present tense is itself a strong indication that Congress intended past exclusion proceedings to be governed by the present procedure. And this conclusion is fortified by the phrase "of this or any other act." The 1952 Act, which is a comprehensive codification of the laws on immigration and nationality, is the statute under which all exclusions after December 24, 1952, would be enforced. "Any other act," referred to in Section 360 (a), must relate to past exclusions under past acts.

The court below recognized that the language of Section 360 (a) "might perhaps seem to bring the case within the words 'otherwise specifically provided'" to take that section out of the general savings clause (Appendix, *infra,* p. 22), but thought the language did not have the same degree of specificity as other sections which have been construed to render the savings clause inoperative. In the 1952 Act, however, Congress did not use any one set formula to show that the savings clause was not to apply. The language of Section 241 (d), referred to below as a specific

section,[7] is quite different from the language of Section 313 (a), also thought by the court below to have the degree of specificity rendering the general savings clause inapplicable.[8] For the reasons set forth immediately above, we think that the language of Section 360 (a), although employing a different set of words, clearly conveys the idea that the procedure in Section 360 (a) is to apply to a past exclusion which "arose" under an act "other" than the 1952 Act, *i. e.* under prior acts. Particularly is this true since, as we have already pointed out, an uninstituted action would not fall within the normal meaning of the terms used in Section 405 (a), and also because a change in remedy is generally construed as being immediately applicable. See *Ex parte Collett,* 337 U. S. 55, 71; *Bruner* v. *United States,* 343 U. S. 112, 116–117.

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[7] Section 241 (d), 66 Stat. at 208, 8 U. S. C. 1251 (d), held to render the savings clause inapplicable to save a prior status of non-deportability (*Gagliano* v. *Nabers*, 222 F. 2d 958 (C. A. 5), certiorari denied, 350 U. S. 902; see also *Marcello* v. *Bonds*, 349 U. S. 302), reads in pertinent part that the "provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding * * * that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

[8] That section, 66 Stat. at 240, 8 U. S. C. 1424 (a), relating to naturalization, like the section construed in *Shomberg* v. *United States*, 348 U. S. 540, begins, "Notwithstanding the provisions of Section 405 (b)." It does not refer to the general savings clause in Section 405 (a).

(c). The legislative history suggests that Congress intended to cut off the right to bring a declaratory judgment under former Section 503 by persons not admitted to the United States when the 1952 Act went into effect. As noted above, pp. 9–10, one of the problems which had arisen under Section 503 had been the number of cases of persons, particularly Chinese, who, although they had never set foot in the United States, claimed to be children of American citizen parents. In the broad study of the working of the existing immigration and nationality laws represented by Senate Report 1515, 81st Cong., 2nd Sess., the following observation is made (p. 777):

> In spite of the definite restrictions on the use and application of section 503 to bona fide cases, the subcommittee finds that the section has been subject to broad interpretation, and that it has been used, in a considerable number of cases, to gain entry into the United States where no such right existed.

The hearings on the McCarran-Walter bill (which became the 1952 Act) indicate that the concern was with "the fraud and the derivative citizenship cases," and with the fact that aliens not entitled to admission were gaining physical entry into the United States and disappearing into the general population. Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess. on S. 716, H. R. 2379,

and H. R. 2816, p. 443; see also pp. 108–109. The enactment of present Section 360, instead of the alternative suggestion that the pattern of former Section 503 be continued,[9] thus represents a clear Congressional decision to curtail the scope of declaratory judgment review, particularly with reference to derivative citizenship claims.

It would be incongruous to impute to Congress an intention to continue the applicability of former Section 503 to actions not yet instituted by the very group whose abuse of such actions led to the change of procedure. And since Congress used no words showing a purpose to have the former remedy apply, but, on the contrary, employed phraseology which, as the court below itself recognized, can reasonably be read to mean that the procedure established by the new Section 360 (a) should be applicable to all exclusions, past or present, where judicial review had not been sought by December 24, 1952, the holding below that the remedy of former Section 503 survives the repeal of that provision is unsound.[10]

[9] The revisions of procedure originated in the Senate bill. The House bill continued the provisions of former Section 503. See S. Rep. 1137, 82nd Cong., 2d Sess., p. 50; H. Rep. 1365, 82nd Cong., 2d Sess., p. 87. The Senate formulation ultimately prevailed.

[10] In view of its holding that the right to bring an action under former Section 503 survived, the court below found it unnecessary to determine whether respondents are "within the United States" so as to be able to bring an action under present Section 360 (a) (Appendix, *infra*, p. 24). We think

CONCLUSION

The decision below is erroneous and is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Nevarez* v. *Brownell*, 218 F. 2d 575. The issue involved is of continuing importance to the courts and to the administrative agencies concerned with nationality and exclusion. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JANUARY 1956.

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it is clear that, if the present statute applies to these respondents, they may seek judicial review only by habeas corpus. In the first place, an excluded person physically admitted to the United States on parole is, in legal contemplation, still in the status of one stopped at the border. *Kaplan* v. *Tod*, 267 U. S. 228; *Shaughnessy* v. *Mezei*, 345 U. S. 206, 213, 215; see Section 212 (d) (5) of the 1952 Act. In the second place, even if within the United States, respondents are limited to habeas corpus since the issue of citizenship arose and was involved in an exclusion proceeding.

APPENDIX

PAGE BLEED THRU

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12092

WONG KAY SUEY, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL, APPELLEES

No. 12093

WONG POO SING, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL, APPELLEES

No. 12094

EMILY WONG, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided October 13, 1955

Mr. Charles R. Richey for appellants.

Mr. Lewis Carroll, Assistant United States Attorney, with whom *Mr. Leo A. Rover,* United States Attorney, *Miss Catherine B. Kelly,* Assistant United States Attorney, and *Mr. Albert E. Reitzel,* Assistant General Counsel, Immigration